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IN THE

Supreme Court of the United States

October Term, 1968.

No. 1155

ANTHONY TARTAGLIO, CAROLYN TARTAGLIO, TERESA BASMAJIAN, JAMES BASMAJIAN, JR., STEVEN BASMAJIAN, CHERYL BASMAJIAN, RENEE BASMAJIAN (infants under the age of 14 years),
Petitioners,

vs.

DEPARTMENT OF INSTITUTIONS AND AGENCIES, DIVISION OF PUBLIC WELFARE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

ROBERT P. SUBRANNI,
Attorney for Petitioner, Cape-Atlantic Legal Services,
1516 Atlantic Avenue,
Atlantic City, New Jersey.
By: GEORGE F. BASON, JR.,
Of Counsel,
American University School of Law,
Washington, D. C. 2001[illegible]

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IN THE

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OCTOBER TERM, 1968.

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ANTHONY TARTAGLIO, CAROLYN TARTAGLIO, TERESA BASMAJIAN, JAMES BASMAJIAN, JR., STEVEN BASMAJIAN, CHERYL BASMAJIAN, RENEE BASMAJIAN (infants under the age of 14 years),

Petitioners,

VS.

DEPARTMENT OF INSTITUTIONS AND AGENCIES, DIVISION OF PUBLIC WELFARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

Anthony Tartaglio, Carolyn Tartaglio, Teresa Basmajian, James Basmajian, Jr., Steven Basmajian, Cheryl Basmajian and Renee Basmajian, your Petitioners, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above entitled case.

OPINIONS BELOW.

The record of the hearing held by the Department of Institutions and Agencies is set forth in the Appendix. The findings of this hearing were not reported and therefore, the Appendix has been submitted as part of the record.

The opinion of the Superior Court of New Jersey, Appellate Division, is set forth in Appendix A hereto, infra page 38.

The dismissal of petitioners' appeal to the Supreme Court of New Jersey is set forth in Appendix A hereto, infra page 44.

JURISDICTION.

1. The judgment of the Superior Court of New Jersey, Appellate Division, was entered on September 17, 1968.

2. The appeal to the Supreme Court of New Jersey from the judgment of the Superior Court of New Jersey, Appellate Division was dismissed on January 14, 1969. It is final by its terms.

3. The Federal question was raised in argument before the Superior Court of New Jersey, Appellate Division, and in the appellate brief submitted to the Supreme Court of New Jersey.

4. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED.

The questions presented are:

1. Can the New Jersey Department of Institutions and Agencies deny assistance to needy children because of income assumed to be available from a "substitute parent" who is not legally responsible for their support under State law?

2. Does the Social Security Act prohibit a State from denying assistance to needy children because of income assumed to be available from a substitute parent, such as a stepparent, who is not legally responsible for their support?

3. Does requiring the stepfather to support stepchildren by regulation contrary to existing law and against the stepfather's will constitute a taking of the stepfather's property without due process and a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution?

4. Are the rights of dependent children under the Fourteenth Amendment violated when an ADC Award is taken away from them prior to any hearing being held thereon?

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any State deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE.

The infant petitioners herein are the recipients of an Aid to Dependent Children Award under the Social Security Act and Title 44 of the New Jersey Statutes. The award was granted in January, 1963.

Petitioner Carolyn Tartaglio, is the mother of the infant petitioners.

Petitioner, Anthony Tartaglio, is the present husband of Carolyn Tartaglio, and stepfather to the infant petitioners. The Tartaglios were married on January 10, 1966. As a result of the marriage, the Aid to Dependent Children Grant (hereafter called ADC) was reduced from $251 per month to $126 per month.

The March, April and May checks for 1967 were held in suspension and not turned over to the petitioners. On June 1, 1967, the Atlantic County Welfare Board informed the petitioners that, after consideration of the stepfather's income, they were no longer eligible for an ADC Grant.

Petitioners requested a hearing before the New Jersey Department of Institutions and Agencies, pursuant to N. J. S. 44:7-18, in order to state their formal objection to the action taken by the Atlantic County Welfare Board. This hearing was held on September 7, 1967, at which time petitioners set forth the argument that the action of the County

Welfare Board constituted a violation of due process, in that petitioner, Anthony Tartaglio, was now forced to support his stepchildren even though he was under no legal obligation to do so.

On November 3, 1967, the Department of Institutions and Agencies upheld the action of the County Welfare Board in terminating payments to the infant petitioners.

On December 7, 1967, an appeal was filed with the Appellate Division of the New Jersey Superior Court contesting the action of the Department of Institutions and Agencies. Subsequent to oral argument, the case of *King v. Smith,* 392 U. S. 309, 88 S. Ct. 2128 (1968), was decided. Counsel for petitioners suggested that the decision was applicable to the present case. However, the Appellate Division affirmed the ruling of the respondent agency on September 19, 1968, and held that *King v. Smith,* supra, was factually distinguishable from the case sub judice.

On October 31, 1968, a Notice of Appeal to the Supreme Court of New Jersey was filed. On January 14, 1969, the New Jersey Supreme Court granted respondent's motion to dismiss petitioners' appeal for lack of a substantial constitutional issue.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT.

Petitioners believe that this case presents an issue which has never been adjudicated and which should be determined. That issue involves the sources of income which a welfare agency may take into consideration in determining the amount of an Aid to Dependent Children grant.

42 U. S. C. A. 602 (a) (7) provides that:

> "The State Agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid * * *."

The New Jersey Legislature has provided that in determining need for financial assistance "there shall be taken into consideration all other income and resources of the dependent child and of the parent, parents, or other relatives with whom such child is living * * *." N. J. S. A. 44:10-3 (c).

Whether the "other income and resources" referred to in both the Social Security Act and Title 44 of the New Jersey Statutes includes "assumed" income or only actual contributions has never been decided by the United States Supreme Court.

In August 1968, the United States Department of Health, Education and Welfare promulgated Section 203.1 of Chapter 11, Title 45 of the department's regulations. The regulation provides:

> "(a) A State plan for aid and services to needy families with children under part A of Title IV of Social Security Act, to be approved under Section 402 of such Act (42 U. S. C. 602), must provide that the determination whether a child has been deprived of parental support or care * * * will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law * * *."

"(b) * * * as provided in Interim Policy Statement No. 4 (33 F. R. 10230, July 17, 1968) * * * in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered * * *."

In the case of *King v. Smith,* 392 U. S. 309, 88 S. Ct. 2128 (1968), the Supreme Court was called upon to interpret the validity of Alabama's so-called "substitute father" provision, under which needy children could be deprived of financial assistance merely because a substitute parent was present in the house. Alabama law did not take into consideration whether the "substitute parent" was under a legal duty to support the children or whether actual contributions for support were being made. Chief Justice Warren, in speaking for the Court, stated that "destitute children who are legally fatherless cannot be flatly denied Federally funded assistance on the transparent fiction that they have a substitute father." 392 U. S. 309, 88 S. Ct. 2128, 2142. The Chief Justice emphasized, however, that actual contributions to the dependent children could be considered by Alabama in deciding the amount of the ADC Grant.

Petitioner, Anthony Tartaglio, alleges that he is in the same position as the petitioners in *King v. Smith,* supra. He is under no legal obligation to support the infant petitioners. *Falzo v. Falzo,* 84 N. J. Super. 343, 202 A. 2d 192 (1964); *Schneider v. Schneider,* 25 N. J. Misc. 180, 52 A. 2d 564 (1947). He is not contributing to their support. Nor, in fact, can he afford to contribute.

Yet, the respondent has terminated the ADC Grant to the infant plaintiffs on the sole ground that petitioner, Anthony Tartaglio's income is "available" for their support.

Respondent made no attempt to ascertain if petitioner was making actual and regular contributions. It merely assumed that petitioner's entire income would be available. In so doing, respondent has failed to abide by Section 203.1 of the HEW Regulations and the holding in *King v. Smith,* supra.

As a result of this unjustified assumption, petitioner, Anthony Tartaglio, has, in effect, been required to contribute to the support of the infant petitioners in direct violation of established New Jersey law. *Falzo v. Falzo,* supra. Such arbitrary action constitutes a deprivation of property and a denial of due process in violation of the Fourteenth Amendment of the United States Constitution.

The infant petitioners have also been denied due process in that respondent and the Atlantic County Welfare Board revoked their ADC award without the benefit of a hearing to determine whether the infant petitioners were being supported by their stepfather.

This denial of aid to needy stepchildren, based on the arbitrary assumption that their stepfather's income is available to them, bears no rational relationship to the purposes of the ADC provisions of the Social Security Act which were designed to "furnish financial assistance * * * to needy dependent children * * *." 42 U. S. C. Section 601.

The infant petitioners do not seek to ban the New Jersey Department of Institutions and Agencies from inquiring into the amount of money which their stepfather may make available to them in the future. Nor do they seek to prohibit the respondent from reducing their ADC grant on the basis of contributions actually made. They seek only a declaration that the respondent may not arbitrarily assume that the stepfather's income is available, regardless of facts to the contrary.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

ROBERT P. SUBRANNI,
Attorney for Petitioner, Cape-Atlantic Legal Services,
1516 Atlantic Avenue,
Atlantic City, New Jersey.
By: GEORGE F. BASON, JR.,
Of Counsel,
American University School of Law,
Washington, D. C. 20016.

APPENDIX A.

REQUEST FOR FAIR HEARING.

253 No. Mississippi Ave.
Atlantic City, N. J. 08401
Tues., August 8, 1967

Dear Comm. Engleman:

I am writing this letter to you in order to request *a fair hearing* in regard to a complaint I have against the Atlantic County Welfare Board.

I have been denied A.D.C. since Feb. 28, 1967, for my five children, ages 5-11. Their father left us five years ago and I applied for Welfare. The youngest was 10 weeks old then. I remarried in January 1966 and at the present time my husband has full responsibility of all five which I feel is very unfair.

I request my lawyer Leonard Wallach be present, and also Mr. George Hackley of Atlantic Human Resources.

I will appreciate hearing from you in the near future.

Thank you,
MRS. CAROLYN TARTAGLIO

AGREEMENT TO HOLD HEARING.

CC: Bureau files
Atlantic CWB
Mr. Wright
Mr. Alexander/Mr. Latham
Mr. Wallach
Mr. Hackley

292-4347

August 29, 1967

Mrs. Carolyn Tartaglio
253 N. Mississippi Avenue
Atlantic City, New Jersey 08401

Re: AC-1897

Dear Mrs. Tartaglio:

This is to supplement our previous correspondence with regard to a Hearing on Assistance for Dependent Children.

Pursuant to your request, a hearing has been scheduled for Thursday, September 7, 1967, at 10:30 A. M., at the office of the Atlantic County Welfare Board, Morris Guards Armory, 12 S. New York Avenue, Atlantic City, New Jersey.

It is necessary for you to attend and you are entitled to bring any other person who can give pertinent testimony necessary to a fair determination.

Attached is a self-explanatory copy of a bulletin describing procedures followed at hearings.

Unless you change your mind about desiring such a hearing and so advise us in writing prior to the hearing date, we will expect you to be present at the time and place mentioned above.

Sincerely yours,

IRVING ENGELMAN,
Irving J. Engelman, Director
Division of Public Welfare

IJE:EAD
Att.
CC: Leonard H. Wallach, Esq.
Mr. George Hackley
27 N. Massachusetts Avenue
Atlantic City, New Jersey 08401

RECORD OF PROCEEDINGS UNDER REVIEW
(R. R. 4:88-8).

TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION:

I, Lloyd W. McCorkle, Commissioner of the New Jersey Department of Institutions and Agencies, do hereby certify to the Appellate Division, Superior Court, pursuant to R. R. 4:88-8, that the following is a record of the proceedings under review in the above-captioned case:

1. On October 26, 1967, pursuant to N. J. S. A. 44:7-18, a Fair Hearing was held by the New Jersey Department of Institutions and Agencies of the appeal of Carolyn Tartaglio from the decision of the Atlantic County Welfare Board which had discontinued payment to her of assistance under the Assistance for Dependent Children Program.

2. The Department of Institutions and Agencies issued its Fair Hearing decision, dated November 3, 1967, which affirmed the action of the Atlantic County Welfare Board in discontinuing said assistance, and plaintiffs appeal from said Fair Hearing decision.

3. Attached hereto is a copy of said Fair Hearing decision. No stenographic report of the testimony in the cause was taken before the agency.

Respectfully submitted,

By: LLOYD W. McCORKLE,
Commissioner of New Jersey
Department of Institutions and
Agencies.

DECISION IN REGARD TO APPEAL FOR FAIR HEARING IN THE CASE OF MRS. CAROLYN TARTAGLIO, 253 N. MISSISSIPPI AVENUE, ATLANTIC CITY, NEW JERSEY.

November 3, 1967

(CASE NO. AC-1897)

On appeal of Mrs. Carolyn Tartaglio, a Hearing was held on September 7, 1967 in the office of the Atlantic County Welfare Board, Atlantic City, New Jersey.

The following persons were present:

Mrs. Carolyn Tartaglio, Appellant;

Mr. Morton Feldman, Attorney for the Appellant;

Mr. George Hackley, Atlantic Human Resources, Inc., Atlantic City, New Jersey;

Mr. Melvin Holloman, Caseworker, Atlantic County Welfare Board;

Mrs. Mary Sheviello, Caseworker, Atlantic County Welfare Board;

Mrs. Rose D. Richards, Supervisor, Atlantic County Welfare Board;

Mr. John Kabala, Jr., Deputy Director, Atlantic County Welfare Board;

Mr. Robert Latham, Field Representative, State Division of Public Welfare;

Mr. George D. Wright, Hearing Officer, State Division of Public Welfare.

Mr. Feldman stated that his client requested the hearing because of the Welfare Board's discontinuance of Assistance for Dependent Children as of March 1, 1967. The correctness of a reduction in the amount of the monthly grant,

which had been made effective February 1, 1966, is also questioned. Both of these actions were based on the income of Anthony Tartaglio, the appellant's second husband and stepfather of appellant's five children. The position of the client is that these actions by the Welfare Board were incorrect because the law of the State of New Jersey does not impose a duty on a husband to support the children of his wife by another marriage and, therefore, the husband should not be required to do so. It is further argued that such a requirement is unfair not only for constitutional reasons but also because it is not conducive to holding a family together, but tends to encourage family break up. It is also alleged that forcing a stepfather to support his stepchildren is depriving him of his property without due process and is contrary to New Jersey State Law.

From testimony heard and records reviewed the following situation is found to exist:

Mrs. Tartaglio, age 30, has five children by her marriage to James Basmajain, the oldest born June 27, 1956 and the youngest born August 24, 1962. Mr. Basmajain deserted ten months after the birth of the youngest child. Appellant applied for and was granted Assistance for Dependent Children, effective January 1963. Her deserting husband was placed under a court order to pay $30.00 weekly. He has not complied regularly. The last payment made by him was in March of this year. These payments were received by the Welfare Board as a credit against appellant's grant. Appellant meanwhile had divorced Mr. Basmajain and, on January 10, 1966, married her present husband. Mr. Tartaglio was at that time employed as a meter policeman. Because of this change in circumstances appellant's case was rebudgeted. The monthly grant was reduced from $251 to $126 because of "increased

support as a result of remarriage." The Welfare Board case record entry, under date of January 1, 1966, notes that "Mr. Tartaglio stated that he would assume as much of the responsibility as he could." At that time there was no recorded objection by the appellant to the downward adjustment of the grant.

A review of the case in the early part of 1967 revealed that Mr. Tartaglio was currently employed by the Minute-Man Dairy Stores, Inc., as a store manager. On May 11, 1967 a wage verification form was mailed to his employer. This was returned by the appellant in person. It bore a signature and showed an annual gross salary of $4200 and a net of $3885. Questioning the validity of this report another form was mailed on May 16, 1967. It was returned on May 19, 1967 signed by Mr. Tartaglio's employer. Seven withholding tax exemptions were claimed; gross annual salary for the past year was given as $4445.95, net $4101.99; and an average weekly salary of $124.87 gross or $115.03 net was also reported for the first eight weeks of 1967. On the basis of the mentioned eight week salary average the case was rebudgeted on a monthly rate (including reduction from $498.46 to $402.46 in earnings to cover certain personal, medical and transportation expenses related to employment) as follows:

REQUIREMENTS		*INCOME*	
Pers. & HH Needs (family unit of 6)	—$260.40	Spouse net earnings	—$402.46
Additional Child	— 30.00	Household needs equiv. (family unit of 6)	— 28.80
Shelter	— 69.00	Household needs for additional child	— 4.30
Surcharge for electricity	— .50		
TOTAL	—$359.90	TOTAL	—$435.56

Surplus: 75.66.

Based on this budget the appellant was found ineligible for continued assistance. The case was discharged, effective June 1, 1967. The March, April and May checks, which had been held suspended, were cancelled.

Mrs. Richards testifying for the Welfare Board said that the budgeting and the disputed actions of the Welfare Board were in accord with State budgetary regulations which are mandatory. Categorical Assistance Budget Manual Chapter 700, Section 706.2 reads in part at follows:

> "When an ADC family consists of a natural or adoptive parent, eligible children and a stepparent (the family may or may not also include ineligible children) need shall be determined on the basis of the family budget unit. Need exists if the income of all members of the family is less than the sum of basic and special circumstance requirements for all family members. However, the amount of the grant shall not exceed the sum of basic and special circumstance requirements for the eligible children and the natural or adoptive parent or needy parent-person. Need does not exist if the income of the family equals or exceeds the sum of the basic and special circumstance requirements for all family members."

It is clearly evident that the relationships and the living arrangements in this case constitute a family budget unit within the meanings of the quoted regulation. The appellant challenges the "legality" of the regulation. This fair hearing proceeding will not undertake to rule on the legality or illegality of official administrative regulations which have been validly promulgated. There is a presumption of legality unless and until a court of competent jurisdiction determines otherwise. The issue which can be resolved by this hearing decision is whether the Atlantic County Welfare Board correctly applied the relevant regulations in this case.

It is determined that the Atlantic County Welfare Board, in considering the net income of the husband and stepfather, after appropriate adjustment allowances, as available for the collective needs of the members of this family budget unit, did correctly apply the provisions of the Budget Manual as quoted above and, as a consequence, family income exceeded requirements to the extent already mentioned. The action of the Welfare Board in having discontinued supplementary assistance is affirmed.

Between the time of the county agent's action herein appealed and the hearing date, Mr. Tartaglio had changed employment. Subsequent to the hearing a further salary wage verification was secured from the employer covering a seven weeks period from the beginning of this employment to the time of hearing. This revealed average gross weekly income of $113.65 and net take home pay averaging $105.82 per week or $458.55 per month.

Substituting monthly take-home pay of $458.55 in place of $498.46 and reducing related transportation expenses in the budgetary computations before described results in a surplus of family income over requirements as recognized by public assistance standards. Therefore, it is further

found that the family continued to be ineligible for public assistance at the time of Hearing. At the same time it is to be observed that the margin by which current income exceeds needs in this family is tenuous and, therefore, the appellant is reminded that it will be appropriate for her to make reapplication for assistance and have a rebudgeting of her case whenever any significant reductions in income or increases in requirements should occur in this family situation.

s/ LLOYD W. McCORKLE,
Commissioner, Department of
Institutions and Agencies,
s/ IRVING J. ENGELMAN,
Director, Division of Public Welfare,
s/ GEORGE D. WRIGHT,
Hearing Officer, Division of Public
Welfare.

GDW:C

October 26, 1967

LETTER 6/20/68 FROM HON. EDWARD GAULKIN.

SUPERIOR COURT OF NEW JERSEY
Appellate Division

EDWARD GAULKIN
Judge

520 Broad Street
Newark, New Jersey
June 20, 1968

Mr. Robert Subranni
c/o Leonard H. Wallach, Esq.
Office of Economic Opportunity
27 No. Massachusetts Avenue
Atlantic City, New Jersey

Mr. Eugene T. Urbaniak
Deputy Attorney General
State House Annex
Trenton, New Jersey
Re: Anthony Tartaglio, *et al.* vs. Department of Institutions and Agencies, etc., Docket No. A-430-67.

Gentlemen:

Please let us know by letter whether you think *King v. Smith,* decided by the United States Supreme Court on June 17, affects the issues in the above-entitled case. If you do, please explain fully how and why you think so.

Please let us have your reply as soon as possible.

Very truly yours,

s/ EDWARD GAULKIN.

EG:E
cc: Honorable Arthur W. Lewis
Honorable Harold Kolovsky
Mr. Kenneth S. Barsby

LETTER 6/26/68 TO HON. EDWARD GAULKIN.

CAPE-ATLANTIC LEGAL SERVICES
1516 Atlantic Avenue
Atlantic City, N. J. 08401
Phone: (609) 348-4208

ROBERT P. SUBRANNI
Acting Director

June 26, 1968

Honorable Edward Gaulkin
Superior Court of New Jersey
Appellate Division
520 Broad Street
Newark, New Jersey

Re: Anthony Tartaglio v. Department of Institutions and Agencies, etc., Docket No. A-430-67.

Dear Judge Gaulkin:

In reply to your letter of June 20, 1968, in which you requested us to advise you whether the case of *King v. Smith,* decided by the United States Supreme Court on June 17 has an effect upon the issues in the above captioned case currently pending in the Appellate Division, please be advised of the following:

We take the position that this case does have a bearing upon the issues before the Court. The primary issue in the *King* case is whether ADC children can be deprived of ADC funds solely because their mother lives with a man who is not obligated by State law to support those children. The Court held that these children cannot be so deprived. In the Tartaglio case, however, the State does *not* assert that the Welfare Agency can terminate ADC funds solely because the children obtain a stepfather but it does assert that the stepfather's entire income must then be included in the family budget when determining the need of the children.

However, Chief Justice Warren, writing the *King* opinion, in addition to discussing the primary issue above, addresses himself directly to the question of determining need in the ADC budget. He states:

> "Further, there is no question that *regular* and *actual* contributions to a needy child, including contributions from the kind of person Alabama calls a substitute fa-

ther, can be taken into account in determining whether the child is needy. Indeed the Act requires that in determining the need the state agency shall take into consideration any other income and resources of any child or relative claiming aid to families with dependent children. Regulations of HEW, which clearly comport with the statute, restrict the resources which are to be taken into account under §602 to those that are, *in fact,* available to an applicant or recipient for current use on a regular basis. This regulation properly *excludes* from consideration resources which are *merely assumed to be available* to the needy individual." (Emphasis supplied.)

What the Welfare Agency in the Tartaglio case is doing, then, appears to be diametrically opposed to the Chief Justice's pronouncement above. For the agency here has never bothered to ascertain the "regular and actual contributions" to the ADC children here, but instead has arbitrarily decided to "merely assume" that 100% of Tartaglio's earnings are available to these needy children.

Perhaps Tartaglio *could* make all his earnings available to the needy children here—and perhaps he *should* make all his earnings available to the needy children here, but the fact remains that he is not legally obligated to contribute *any* of his earnings to these children's support. And in such a case, the only germane question is: *Does* Tartaglio make his earnings available to the needy children here? The Welfare Agency has made no attempt to answer this question.

As in New Jersey, Alabama does not consider a stepfather a legally responsible relative. Thus, the Chief Justice states:

> "It seems clear, however, that even a stepfather who is not the child's natural parent and has not acquired legal custody of him is under an obligation of support

only if he has made this 'voluntary assumption of parenthood.' * * * 'Further, the Alabama Supreme Court has emphasized that the alleged father's intention to support the child, requisite to a finding of voluntary assumption of parenthood, *should not be slightly or hastily inferred.*'" (Emphasis added.)

Chief Justice Warren also discussed at some length the purposes of the ADC program. In part he says as follows:

"The AFDC program was designed to meet a need un-met by programs providing employment for breadwinners. * * * AFDC was intended to provide economic security for children whom Congress could not reasonably expect would be provided for by simply securing employment for family breadwinners. We think it apparent that neither Congress nor any reasonable person would believe that providing employment for some man who is under *no legal duty to support* a child would in any way provide meaningful economic security for that child. * * * Children who are told, as Alabama has told these appellees, to look for their food to a man who is *not in the least obliged to support them* are without meaningful protection. Such an interpretation of congressional intent would be most unreasonable, and we decline to adopt it." (Emphasis added.)

Obviously, New Jersey's only real interest in the Tartaglio case is the protection of the taxpayer's dollar. But as the Chief Justice said of Alabama in the *King* case:

"Its interest in economically allocating its limited AFDC resources may be protected by its undisputed power to set the level of benefits and the standard of need, and by taking into account in determining whether a child is needy all *actual* and *regular* contributions to his support." (Emphasis added.)

In short, therefore, *King v. Smith,* makes it quite clear that if a person is not *legally obligated* to support an ADC child, only his *actual* and *regular* contributions to the child's support are allowed to be considered in determining the ADC child's needs.

In the light of *King v. Smith,* then, we feel that the Atlantic County Welfare Board should not be allowed to merely assume that 100% of the stepfather's income here is available to these needy ADC children and to automatically terminate all aid to the children on this assumption.

Respectfully,

s/ ROBERT P. SUBRANNI.

RPS:say

LETTER 7/22/68 to HON. EDWARD GAULKIN.

STATE OF NEW JERSEY

DEPARTMENT OF INSTITUTIONS AND AGENCIES

P. O. Box 1237 Trenton 08625

July 22, 1968

The Honorable Edward Gaulkin
Judge, Appellate Division
Superior Court of New Jersey
520 Broad Street
Newark, New Jersey

Re: Anthony Tartaglio, et al v. Dept. Insts. & Agencies, A-430-67.

Dear Judge Gaulkin:

We have recently received a copy of the letter which Robert P. Subranni, Esq., mailed to your Honor on June 26, 1968, in response to your Honor's joint letter to the attorneys of record dated June 20, 1968, inquiring whether counsel thought *King v. Smith*, decided by the U. S. Supreme Court, affects the issues in this case.

We respectfully submit that the case of *King v. Smith* is not applicable to our instant case. In the words of the Supreme Court opinion itself, the issue in that case was "the validity of Alabama's so-called 'substitute father' regulation which denies AFDC payments to the children of a mother who 'cohabits' in or outside her home with any single or married able-bodied man." In our own case such an issue is not involved and New Jersey does not have a "substitute father" regulation which denied AFDC payments to the children of a mother who cohabits with a man.

In the *King* case the court stated that under the Alabama Regulation, referring to the "substitute father"

> "... It is also irrelevant whether he is legally obligated to support the children, and whether he does in fact contribute to their support. What is determinative is simply whether he 'cohabits' with the mother."

In the *King* case the alleged "substitute father" of the applicant's children was a married man who had a family of his own consisting of a wife and 9 children with whom he lived and who were dependent upon him for support. Assistance was denied to the applicant's children solely because the substitute father came to her home on weekends and had sexual relations with her. The "substitute father" was not the father of any of the applicant's children; he was not legally obligated to support any of the children; he was not willing or able to support any of the children; and, in fact, he did not support any of them. The court made

a special effort to delineate what was being considered in the case when it stated the following:

> "We think it well to note at the outset what is *not* involved in this case. . . . There is no question that regular and actual contributions to a needy child, including contributions from the kind of person Alabama calls a substitute father, can be taken into account in determining whether a child is needy. In other words, if by reason of such a man's contribution, the child is not in a financial need, the child would be ineligible for AFDC assistance without regard to the substitute father rule."

The court then found, however, that "the regulation itself is unrelated to need, because the actual financial situation of the family is irrelevant in determining the existence of a substitute father." In concluding his opinion, Chief Justice Warren stated at the end thereof as follows:

> "We think it well, in concluding, to emphasize that no legitimate interest of the State of Alabama is defeated by the decision we announce today. The State's interest in discouraging illicit sexual behavior and illegitimacy may be protected by other means, subject to constitutional limitations, including state participation in AFDC rehabilitative programs. Its interest in economically allocating its limited AFDC resources may be protected by its undisputed power to set the level of benefits and the standard of need, *and by its taking into account in determining whether a child is needy all actual and regular contributions to his support.*"

It becomes apparent that in the *King* case the court dealt with a regulation of the State of Alabama which denied AFDC payments to the children of a mother solely and per se because she cohabitated with a man who was not her

husband. The Supreme Court found that the regulation was applied whether the substitute father was actually the father of the children, whether he was legally obligated to support the children, and whether or not he did in fact contribute to their support. The determination of the regulation's applicability turned solely on whether or not the man "cohabits" with the mother. In our case, the children of the applicant were not denied AFDC payments because of any "substitute father" regulation. In our case the Tartaglio children were not denied AFDC payments because the mother had remarried and because they now had a stepfather but because the children were determined not needy. The important consideration in our case is that New Jersey may, as the Supreme Court, in the *King* case, said Alabama could, take into consideration all regular and actual contributions to a needy child to determine whether the child was needy. This is precisely what happened in our case. When the regular and actual contributions of the stepfather to the family were taken into account the children were found not to be in financial need and, therefore, ineligible for AFDC assistance, and this resulted entirely without regard to any "substitute father" rule.

Plaintiff's memorandum-letter suggested that the Department may have "assumed" the stepfather's actual and regular contributions to the children. This is a gratuitous assumption without foundation in the record. Federal regulations provide that in determining need, a state must take into account only available and regular contributions, and must not assume income. (Federal Handbook, pt IV, Sec. 3120.) The Department has known of this federal regulation and has consistently required the various Welfare Boards to follow same. In our case the stepfather *does* make his income available to the children. This was never a factual issue in our case.

As stated in the Fair Hearing Decision contained in plaintiff's Appendix (D5A):

> "The Welfare Board case record entry under date of January 1, 1966, notes that 'Mr. Tartaglio stated that he would assume as much of the responsibility as he could.' At that time, there was no recorded objection by the appellant to the downward adjustment of the grant."

For the above reasons we respectfully submit that the case of *King v. Smith* has no pertinence to our present case since the factual material and the New Jersey regulations involved herein are entirely different from those in the *King* case.

Respectfully submitted,

DEPARTMENT INSTITUTIONS
AND AGENCIES,
s/ EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:bce
cc: Hon. Arthur W. Lewis
Strawbridge Lake Office Bldg.
Rte. 38 & South Church St.
Moorestown, N. J.

Hon. Harold Kolovsky
25 East Salem St.
Hackensack, N. J.

Mr. Kenneth S. Barsby
Clerk, Appellate Division
State House Annex
Trenton, N. J.

Robert P. Subranni, Esq.
c/o Leonard H. Wallach, Esq.
Office of Economic Opportunity
27 N. Massachusetts Ave.
Atlantic City, N. J.

LETTER 7/26/68 TO HON. EDWARD GAULKIN.

CAPE-ATLANTIC LEGAL SERVICES
1516 Atlantic Avenue
Atlantic City, N. J. 08401
Phone: (609) 348-4208

ROBERT P. SUBRANNI
Acting Director

July 26, 1968

The Honorable Edward Gaulkin
Judge, Appellate Division
Superior Court of New Jersey
520 Broad Street
Newark, New Jersey
Re: Anthony Tartaglio, et al vs. Department of Institutions & Agencies, Docket No. A-430-67.

Dear Judge Gaulkin:

Your letter of June 20, 1968, requested both counsel in the above captioned matter to submit a letter indicating how they thought the *King v. Smith* case affected this case. Inasmuch as counsel for the defendant chose to wait until after he had received a copy of our letter before complying with your request, we respectfully request that you will

entertain and consider the following points in refutation of several of the contentions put forth in defendant's letter:

We were pleased to ascertain that defendant agrees with us that only "actual and regular" contributions to an ADC child from a non-legally responsible relative can be included in determining the need of that child. We agree with the defendant that the Federal Handbook, Pt. IV, Sec. 3120, in fact requires that this be done and that the State must not "assume income." But we disagree with the defendant's contention (on Page 3 of his letter) that "The Department has known of this Federal regulation and has consistently required the various Welfare Boards to follow same." As a matter of fact, neither the applicable Statute of New Jersey nor the applicable regulation from the Budget Manual require that this be done.

N. J. S. A. 44:10-3 (c) states as follows:

> "To provide that, in determining need for financial assistance and the amount of assistance to be granted, there shall be taken into consideration *all other income* and resources of the dependent child and of the parent, parents, or *other relatives with whom such child is living.*" (Emphasis added.)

Nowhere does this New Jersey Statute or any other New Jersey statute require that only "actual and regular" contributions to an ADC child by a non-legally responsible relative be allowed to be considered when determining the child's need. Indeed, the only possible reading of this Statute would indicate that a Welfare Board is empowered to automatically include the entire income of any relative who happens to be living with the ADC child. In addition, the Statute appears to allow the entire income of such person to be included regardless of whether this relative is legally obligated to support the child and regardless of whether this

relative is "actually and regularly" contributing his entire income to the support of the child.

Section 706.2 (2) of the Categorical Assistance Budget Manual conforms to N. J. S. A. 44:10-3 (c), and likewise fails to require that only "actual and regular" contributions be considered.

Thus, insofar as the above Statute and regulation conflict with Federal regulations and the recent Supreme Court's rulings in *King v. Smith,* it would seem that they must be modified accordingly.

Despite the fact that *King v. Smith* is primarily concerned with a "substitute father" rule, which New Jersey does not have, a large part of the decision is concerned with the question of how to determine the need of an ADC child. Obviously that is also the precise question in dispute here, so it is difficult for us to comprehend the defendant's contention that *King v. Smith* has no pertinence to our present case. The *King* case explicitly requires that only "actual and regular" contributions to an ADC child can be considered in determining need. And, as yet, New Jersey has no such requirement.

There is absolutely no indication in the record that the Atlantic County Welfare Board attempted to ascertain the "actual and regular" contributions made by Mr. Tartaglio to the ADC children. As a matter of fact, the record indicates just the opposite by expressly stating (on page 6) that the contributions made by Mr. Tartaglio were ascertained solely by taking the average income earned by Mr. Tartaglio over a selected eight-week period (minus employment related expenses) and ascribing the entire amount as resources of the ADC children.

In short, neither the welfare laws nor regulations of New Jersey require, at present, that only the "actual and regular" contributions of a non-legally responsible relative be considered in determining the need of an ADC child as re-

quired by Federal regulations and The Atlantic County Welfare Board did not conform to these standards set forth by federal regulations and *King v. Smith.*

For the above reasons we respectfully submit that the case of *King v. Smith* has a direct bearing on our present case and that N. J. S. A. 44:10-3 (c) and the regulations pursuant thereto must be modified to conform to that Supreme Court ruling.

Respectfully submitted,

s/ ROBERT P. SUBRANNI.

RPS:say

cc: Hon. Arthur W. Lewis
Strawbridge Lake Office Building
Route 38 & S. Church Street
Moorestown, New Jersey

Hon. Harold Kolovsky
25 East Salem Street
Hackensack, New Jersey

Mr. Kenneth S. Barsby
Clerk, Appellate Division
State House Annex
Trenton, New Jersey

Eugene T. Urbaniak, Deputy Attorney General
Department of Institutions and Agencies
P. O. Box 1237
Trenton, New Jersey

LETTER 7/31/68 to HON. EDWARD GAULKIN.

STATE OF NEW JERSEY

DEPARTMENT OF INSTITUTIONS AND AGENCIES

P. O. Box 1237 Trenton 08625

July 31, 1968

The Honorable Edward Gaulkin
Judge, Appellate Division
Superior Court of New Jersey
520 Broad Street
Newark, New Jersey

RE: Anthony Tartaglio, et al v. Dept. Insts. & Agencies, A-430-67.

Dear Judge Gaulkin:

We received a copy of our adversary's letter to you dated July 26, 1968.

We feel our prior letter to you dated July 22 fully explains why the Supreme Court case of *King v. Smith* does not affect our case. The *King* case struck down the Alabama regulation which denied any consideration of AFDC benefits to the children of a mother who cohabits with a man, whether in her home, outside her home, etc., and regardless of whether he uses his whole income to support the children or whether he fails to give them a dime. New Jersey has no such "substitute father" regulation.

In our case the Welfare Board did consider the actual and regular contributions of the stepfather, Mr. Tartaglio. There was *no* factual issue on this in our case.

Finally, in Mr. Subranni's letter he states as follows: "In short, neither the welfare laws nor regulations of New

Jersey require, at present, that only the 'actual and regular' contributions of a non-legally responsible relative be considered in determining the need of an ADC child as required by Federal regulations . . ."

In response to this we enclose a copy of "Circular Letter No. 325" dated June 1, 1967, issued by the New Jersey Department of Institutions and Agencies to all County Welfare Directors. These "Circular Letters" are promulgated by the Department and filed with the New Jersey Secretary of State as duly enacted regulations of the Department.

It is to be noted that the "Circular Letter" quoted a revision of the Federal Handbook of Public Assistance Administration, Part IV, Sec. 3120, which was sent to the various state welfare departments in April of 1967. The "Circular Letter" requires that the Welfare Boards omit "from consideration in determining need and amount of payment any income or resources merely assumed to be possessed by the individual. Thus, income must not be considered where it is not, in fact, currently available to the needy individual . . ." This was at all times followed in this case.

Respectfully submitted,

DEPARTMENT INSTITUTIONS
AND AGENCIES,
s/ EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH
cc: Hon. Arthur W. Lewis
Strawbridge Lake Office Bldg.
Rte. 38 & South Church St.
Moorestown, N. J.

Hon. Harold Kolovsky
25 East Salem St.
Hackensack, N. J.

Mr. Kenneth S. Barsby
Clerk, Appellate Division
State House Annex
Trenton, N. J.

Robert P. Subranni, Esq.
c/o Leonard H. Wallach, Esq.
Office of Economic Opportunity
27 N. Massachusetts Ave.
Atlantic City, N. J.

PART 203.1 OF CHAPTER II, TITLE 45 OF CODE OF FEDERAL REGULATION OF DEPARTMENT OF HEALTH, EDUCATION AND WELFARE—CITED IN 33 F. R. 11290.

CHAPTER II—SOCIAL AND REHABILITATION SERVICE (ASSISTANCE PROGRAMS), DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE.

Federal Register, Vol. 33, No. 154—Thursday, August 8, 1968.

PART 203—DEPRIVATION OF PARENTAL SUPPORT OR CARE.

Notice of proposed regulations for the aid to families with dependent children program, with respect to the deprivation of parental support or care, was published in the FEDERAL

REGISTER of June 26, 1968 (33 F. R. 9346). The views of interested persons were requested, received, and considered, and, in the light thereof, certain changes in the proposed regulations were made. Accordingly, a new Part 203 is added to Chapter II of Title 45 of the Code of Federal Regulations as set forth below.

§203.1 Condition of plan approval; bases for determining eligibility of a child.

(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act, to be approved under section 402 of such Act (42 U. S. C. 602), must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. As provided in Interim Policy Statement No. 4 (33 F. R. 10230, July 17, 1968), items 3. C. 2 (i) and (iii), and 6 (ii), in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance pay-

ment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.

(c) Any State whose past policies and procedures with respect to the determination referred to in paragraph (a) of this section have been inconsistent with the provisions in paragraph (a) or (b) of this section must provide effective methods for giving notice of its present policies and procedures to former and potential applicants for and recipients of AFDC and to other interested persons. The methods which the State agency proposes to meet this notice requirement must be submitted to and be approved by the Regional Commissioner, SRS, DHEW. In addition, where the records of the State agency permit identification of persons whose cases have been terminated or applications denied at any time within the past 2 years by reason of such inconsistent policies or procedures, the State agency must give prompt written notification to such persons concerning the change in such policies or procedures. Such notification must be given within 90 days of publication of the regulations in this part and must explain clearly the rights which such persons have under the regulations in this part.

(Sec. 1102, 49 Stat. 647, sec. 402, 49 Stat. 627; 42 U. S. C. 1302, 602.)

Effective date. The regulations in this part shall be effective on the date of their publication in the FEDERAL REGISTER.

Dated: August 2, 1968.

[SEAL] MARY E. SWITZER,
Administrator, Social and Rehabilitation Service.

Approved: August 2, 1968.
WILBUR J. COHEN,
Secretary.

[F. R. Doc. 68—9480; Filed, Aug. 7, 1968; 8:48 a.m.]

JUDGMENT AND MANDATE ON AFFIRMANCE.

It is hereupon ordered and adjudged that the Determination of the said Department of Institutions and Agencies is Affirmed without costs and that the record be remitted to the Department of Institutions and Agencies to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division.
Judgment Entered: September 19, 1968.
Mandate Issued: October 1, 1968.

s/ MORTIMER G. NEWMAN, JR.,
Clerk of the Superior Court.

OPINION OF APPELLATE DIVISION.

Argued June 3, 1968; supplemental briefs June 26, 1968, July 22, 1968, July 26, 1968, and July 31, 1968—Decided Sep. 19, 1968.

Before: JUDGES GAULKIN, LEWIS and KOLOVSKY.

On appeal from the Department of Institutions and Agencies.

MR. ROBERT P. SUBRANNI argued the cause for appellants (MR. LEONARD H. WALLACH, Legal Services Project, Atlantic Human Resources, Inc., Office of Economic Opportunity, attorney).

MR. EUGENE T. URBANIAK, Deputy Attorney General, argued the cause for respondent (MR. ARTHUR J. SILLS, Attorney General of New Jersey, attorney).

The opinion of the court was delivered by LEWIS, J. A. D.

Plaintiffs, a family of seven, appeal from a determination of the Department of Institutions and Agencies (department) affirming the action of the Atlantic County Welfare Board (board) in discontinuing payments under the Assistance for Dependent Children (ADC) program created by N. J. S. A. 44:10-1, et seq., and 42 U. S. C. A., §601, et seq.

The wife, mother of five children, after obtaining a divorce from their father, married her present husband, Anthony Tartaglio. Before the remarriage she received welfare assistance. Subsequently, there was a rebudgeting by the board of the family income and expenses which took into consideration the stepfather's earnings; the board found that there was a monthly surplus of $75.66. Accordingly, it determined that the children were ineligible for continued assistance. On appeal to the department, a "fair hearing" was held, pursuant to N. J. S. A. 44:7-18 and 44:10-2, which culminated in that agency's affirming the decision of the board. We here note that due process is satisfied in administrative proceedings if a fair hearing is accorded before the order becomes effective. *In re Masiello,* 25 N. J. 590 (1958); *N. J. Zinc Co. v. Board of Review,* 25 N. J. 235 (1957).

On appeal to this court plaintiff's principal arguments are based upon the contention that the board was not authorized to take the stepfather's earnings into consideration because the stepfather is not required by law to support his stepchildren, citing *Schneider v. Schneider,* 25 N. J. Misc. 180, 52 A. 2d 564 (Ch. 1947), and *Falzo v. Falzo,* 84 N. J. Super. 343 (App. Div. 1964). Compare *Paragian v. Paragian,* 48 N. J. Super. 207, 209-213 (J. & D. R. Ct. 1957), and *Williamson v. Williamson,* 183 Ky. 435, 209 S. W. 503, 505 (Ct. App. 1919). Neither the board nor the department purported to impose a legal obligation on the stepfather to support his stepchildren and, indeed, it was not within their power to do so.

The record before us reveals that plaintiffs are living together as a family unit; the stepfather considered the stepchildren dependents for purposes of withholding tax exemptions; he assumed the role of a spouse and father to his wife's offspring, and he was willing to assume "as much of the responsibility as he could."

In Connecticut where the statutes, as in New Jersey, do not impose an obligation of support upon a stepfather, a denial of financial assistance to dependent children of a mother who had remarried was sustained, the court stating:

> "The mother, the stepfather and her children are a family unit the resources of which should be considered. For the state to furnish aid, there should be an actual need. Need should not be created where none exists, based on the absence of a legal obligation on the part of the stepparent to support his stepchildren." *Ladd v. Welfare Commissioner,* 3 Conn. Cir. 504, 217 A. 2d 490, 492 (Cir. Ct. App. Div. 1965).

People v. Owens, 231 Cal. App. 2d 691, 42 Cal. Rptr. 153, 157 (Dist. Ct. App. 1965), is to the same effect. It has been held that even absent a formal marriage the income of one assuming the role of a spouse is includable in budgeting the family needs. See *County of Kern v. Coley,* 229 Cal. App. 2d 172, 40 Cal. Rptr. 53, 56-58 (Dist. Ct. App. 1964); *People v. Rozell,* 212 Cal. App. 2d 875, 28 Cal. Rptr. 478, 480-481 (Dist. Ct. App. 1963); *People v. Shirley,* 55 Cal. 2d 521, 524, 360 P. 2d 33, 11 Cal. Rptr. 537, 539 (Sup. Ct. 1961). But *cf.* Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 Yale L. J. 1245 (1965).

In the instant matter, the decision of the department refers specifically to its rules and regulations identified as the "Categorical Assistance Budget Manual" which, in pertinent part, provides:

> "When an ADC family consists of a natural or adoptive parent, eligible child(ren) and a stepparent (the family may or may not also include ineligible child(ren)) * * * need shall be determined on the basis of the family budget unit. Need exists if the income of *all* members of the family is less than the sum of basic and special circumstance requirements for all family members * * * . Need does *not* exist if the income of

the family equals or exceeds the sum of the basic and special circumstance requirements for all family members." §706.2, subsection c 2 (a).

The department adopted rules and regulations pursuant to N. J. S. A. 44:10-3 which authorizes their adoption, generally, "to secure for the State of New Jersey the maximum Federal financial participation that is available with respect to a program of assistance for dependent children" and to otherwise accomplish the purposes of the act and, specifically, to provide that in determining need for financial assistance, there shall be taken into consideration all income and resources "of the dependent child and of the parent, parents, or other relatives with whom such child is living." N. J. S. A. 44:10-1, subsection (c) (2), in defining "dependent child," includes a child living with a "stepfather" and subsection (d) (1) provides that "parent or relative with whom a dependent child is living" means a person related to the dependent child in the manner described in subsection (c) (2).

The New Jersey enactment, N. J. S. A. 44:10-1, et seq., implements federal legislation dealing with "Grants to States for Aid and Services to Needy Families with Children." 42 U. S. C. A., §601, et seq. Section 602(a)(7) requires that a state agency, in determining need, shall take into consideration the income and resources "of any child or relative claiming aid to families with dependent children, * * * " and section 606(a) states that the term "dependent child" means a needy child,

"(1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, *stepfather*, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew,

> or niece * * *." (Emphasis supplied.) (This section is incorporated by reference in section 606 (c) which defines the term "relative with whom any dependent child is living.")

We note also that under section 604 federal payments may be discontinued if the state fails to comply substantially "with any provision required by section 602(a)."

It is thus clear that the applicable administrative rules and regulations, the authority for which is not challenged, reflect an adherence to the express policy of the federal and state legislation to include, in a family budget formula, the income of a stepfather who assumes a spousal relationship. The wisdom of such legislation, even if it should be considered debatable, is not to be questioned by the judiciary. See *Dacunzo v. Edgye,* 19 N. J. 443, 454 (1955). Accord, *Galvan v. Press,* 347 U. S. 522, 528, 74 S. Ct. 737, 98 L. Ed. 911, 920 (1954).

Moreover, the department concluded its determination with the observation that it would be appropriate for plaintiffs to reapply for assistance "whenever any significant reductions in income or increases in requirements should occur in this family situation." Note, N. J. S. A. 44:7-22, 44:10-2.

We find *King v. Smith,* —— U. S. ——, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968), to be factually and legally distinguishable. The issue in that case was the validity of the State of Alabama's "substitute father" regulation "which denies AFDC [Aid to Families With Dependent Children] payments to the children of a mother who 'cohabits' in or outside her home with any single or married able-bodied man." 88 S. Ct. at p. 2130, 20 L. Ed. 2d, at p. 1122. There the so-called substitute father of applicant's four children was a married man who had a family of his own consisting of a wife and nine children with whom he lived and who were dependent upon him for support. He went to applicant's

home on "weekends and had sexual relations with her"; further, he was "not willing or able" to support her children. 88 S. Ct. at pp. 2132, 2132-33, 20 L. Ed. 2d, at pp. 1124, 1125. The Alabama regulations with which the court dealt denied payments to applicant's children solely and *per se* because she cohabited with a man who was not her husband. The determination of the regulations' applicability turned on whether or not the man "cohabit[ed]" with the mother. In effect the classification was held arbitrary since a denial of aid to otherwise eligible beneficiaries because of their mother's sexual misbehavior was a reason unrelated to any purpose of the statutes. New Jersey does not have a "substitute father" regulation which denies AFDC payments to the children of a mother who cohabits with a man.

The order of the department is affirmed.

NOTICE OF APPEAL.

(Filed October 31, 1968.)

To: Hon. Arthur J. Sills, Attorney General, State of New Jersey, Attorney for Defendant.

SIRS:

Notice is hereby given that plaintiffs appeal to the Supreme Court of New Jersey from the final judgment of the Appellate Division of the Superior Court entered in favor of the defendant in this action on September 19, 1968.

ROBERT P. SUBRANNI,
Acting Director,
Cape-Atlantic Legal Services, Inc.,
Attorney for Plaintiffs.

Dated: October 30, 1968.

DISMISSAL OF APPEAL.

SUPREME COURT OF NEW JERSEY.

M-110 September Term 1968.

(Filed January 14, 1969.)

ANTHONY TARTAGLIO, et al.,
Plaintiffs-Appellants,

v.

DEPT. OF INSTITUTIONS & AGENCIES,
Defendant-Respondent.

This matter having been duly considered by the Court, it is Ordered that the motion to dismiss the appeal is granted.

It is further Ordered, treating the papers filed as a petition for certification, that certification be denied on the merits.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 14th day of January 1969.

s/ JOHN H. GILDEA,
Clerk.

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Cases Cited

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1155

ANTHONY TARTAGLIO, CAROLYN TARTAGLIO, TERESA BASMAJIAN, JAMES BASMAJIAN, JR., STEVEN BASMAJIAN, CHERYL BASMAJIAN, RENEE BASMAJIAN (infants under the age of 14 years),

Petitioners,

vs.

DEPARTMENT OF INSTITUTIONS AND AGENCIES, DIVISION OF PUBLIC WELFARE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR RESPONDENT IN OPPOSITION

Question Presented

May the State of New Jersey, in determining whether a child is needy, take into account the actual and regular contributions to his support made by his stepfather with whom he lives as part of a family unit?

Statement

Petitioners are a family unit consisting of five minor children, their mother, and the mother's second husband, the stepfather of the children, who maintain a home together.

In 1963 Carolyn Basmajian and her five minor children were deserted by her husband and the father of the children, James Basmajian, and thereafter the family was granted Assistance for Dependent Children from the Atlantic County Welfare Board, effective January 1963. Carolyn Basmajian later secured a divorce from James Basmajian and on January 10, 1966 she married her present husband, Anthony Tartaglio, one of the instant petitioners.

After this change in the family's composition, the Atlantic County Welfare Board rebudgeted the family in order to consider any changes in income and needs. After considering the income of the members of the family, including the stepfather, who, incidentally, informed the county welfare board that he would assume as much of the responsibility for supporting his stepchildren as he could, the welfare board reduced the monthly grant from $251.00 to $126.00 because of the increased support to the children following the remarriage.

In 1967 the board rebudgeted the family again and found that based on an increase in income the members were ineligible for continued assistance, and discharged the case effective June 1, 1967.

The mother appealed to the New Jersey Department of Institutions and Agencies for an administrative Fair Hearing, pursuant to N.J.S.A. 44:7-18 from the determination of the Atlantic County Welfare Board. On October 26, 1967 the Department held a Fair Hearing, and on

November 3, 1967, issued its decision which affirmed the action of the county welfare board. The Fair Hearing decision stated that the county welfare board correctly applied the relevant budgetary regulations in the case. It also observed that petitioners could reapply for assistance and have a rebudgeting whenever any significant change in income or needs should occur in the family.

The petitioners then appealed to the Appellate Division of the Superior Court of the State of New Jersey. Attorneys for both sides fully briefed the case and argued it before said court which rendered its decision on September 19, 1968. The court affirmed the ruling of the New Jersey Department of Institutions and Agencies and held that the United States Supreme Court case of *King* v. *Smith,* 392 U. S. 309 (1968), was both "factually and legally distinguishable" from the case *sub judice.*

On October 31, 1968 petitioners filed a notice of appeal to the Supreme Court of New Jersey. On January 14, 1969, the New Jersey Supreme Court granted respondent's motion to dismiss petitioner's appeal for lack of a substantial constitutional issue, and also denied certification to petitioners.

This petition for a Writ of Certiorari followed.

Reasons for Not Granting the Writ

This case does not warrant review by this court on *Certiorari* for any one of the traditional reasons.

I

The decision below is clearly correct.

This case was decided by both the State administrative agency and the State court upon a record of certain facts, which the New Jersey Court found as follows:

> "The record before us reveals that plaintiffs are living together as a family unit; their stepfather considered the stepchildren dependents for purposes of withholding tax exemptions; he assumed the role of a spouse and father to his wife's offspring; and he was willing to assume 'as much of the responsibility as he could'."

The Court also found that the State administrative agency's decision was correctly based on the applicable New Jersey and federal statutes and regulations.

In the agency's decision there was a specific referral to its rules and regulations which are identified as the "Categorical Assistance Budget Manual", and the Court found as follows:

> Section 706.2, subsection c 2(a) thereof, provides as follows:
>
> "When an ADC family consists of a natural or adoptive parent, eligible child(ren) and a stepparent (the family may or may not also include ineligible child(ren)) * * * need shall be determined on the basis of the family budget unit. Need exists if the income of ALL members of the family is less than the sum of basic and special circumstance requirements for all family members * * * Need does NOT exist if the income of the family equals or exceeds the sum of the basic and special circumstance requirements for all family members."

The department adopted these rules and regulations pursuant to N.J.S.A. 44:10-3 which authorizes their adoption, generally, "to secure for the State of New Jersey the maximum Federal financial participation that is available with respect to a program of assistance for dependent children" and, specifically, to provide that in determining

need for financial assistance, there shall be taken into consideration all income and resources "of the dependent child and of the parent, parents, or other relatives with whom such child is living". N.J.S.A. 44:10-1, subsection (c) (2), in defining "dependent child", includes a child living with a "stepfather" and subsection (d)(1) provides that "parent or relative with whom a dependent child is living" means a person related to the dependent child in the manner described in subsection (c)(2).

The New Jersey enactment (N.J.S.A. 44:10-1, *et seq.*), implements federal legislation dealing with "Grants to States for Aid and Services to Needy Families with Children". 42 U.S.C.A. Sec. 601, *et seq.* Section 602(a)(7) of the federal law requires that a state agency, in determining need, shall take into consideration the income and resources "of any child or relative claiming aid to families with dependent children, * * *" and section 606(a) states that the term "dependent child" means a needy child,

> "(1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, STEPFATHER, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece * * * (Emphasis supplied.) (This section is incorporated by reference in section 606(c) which defines the term 'relative with whom any dependent child is living')."

Moreover, under Section 604 of the federal law, payments may be discontinued if the state fails to comply substantially with any provision required by Section 602(a).

The state court reviewed these state and federal legislative enactments and concluded:

> "It is thus clear that the applicable administrative rules and regulations, the authority for which is not challenged, reflect an adherence to the express policy of the federal and state legislation to include, in a family budget formula, the income of a stepfather who assumes a spousal relationship. The wisdom of such legislation, even if it should be considered debatable, is not to be questioned by the judiciary." *Tartaglio* v. *Dep't of Institutions & Agencies,* 102 N. J. Super. 592 (App. Div. 1968), at 596.

It is respectfully submitted that this conclusion is sound and that the court below correctly analyzed both the facts and the law involved in this case.

II

There is no conflict of decisions.

There are no decisions contrary to the decision in the instant case. The stepfather petitioner alleges that he "is in the same position as the petitioners in *King* v. *Smith,* 392 U. S. 309, 88 S. Ct. 2128 (1968). He is under no legal obligation to support the infant petitioners. He is not contributing to their support. Nor, in fact, can he afford to contribute" (P7).

As indicated previously, the decision in the case was based on an entirely different set of facts from what the above allegations would infer. It was found below that the petitioners, the mother, her children and the stepfather, all lived together as a true family unit; that the stepfather assumed the role of the spouse to his wife and a father to his wife's offspring; that he claimed the stepchildren as dependents for purposes of federal income tax withholding exemptions; and that he even confided to the welfare personnel that he was willing to assume as much

of the responsibility for the support of the children as he could.

Despite this, the petitioners are now seeking *Certiorari* from this Court based on an implication that the facts were contrary to these facts as found by the State administrative agency and court and on the allegation that the facts in the case are "like" those in the *King* case (*supra*). We urge, therefore, that petitioners are now trying to submit this case to the United States Supreme Court upon an alleged or hypothetical state of facts that are entirely at variance from the facts which were considered by the State administrative agency and the State court. This, of course, they may not do, and this court should not *Certiorari* to consider a question not raised by the true facts of the case.

The factual differences between our case and the *King* case, *supra,* are dramatic and obvious. In the *King* case, the so-called "substitute father" of the children, was a man who had 9 children of his own and lived with his own wife and family all of whom were dependent upon him for support. He was not the father of any of the children of the mother; he was not obligated under Alabama law to support any of those children; he was not willing or able to support the children; and, in fact, he *did not* support them. (Emphasis added.) In our case, Mr. Tartaglio is married to the mother of the children; he, the mother and all of the children live together as a family unit; he considered these children as his dependents for the purposes of withholding tax exemptions on his United States Federal Income Tax returns; he assumed the role of a spouse to the mother and a father to all of the children; he was willing to assume as much of the responsibility for their support as he could.

An example of petitioners' erroneous reasoning is detectable in the allegation that following the marriage of

the mother to her second husband, and "as a result of the marriage" the Aid to Dependent Children grant was reduced. On the contrary, the grant was not reduced "as a result of the marriage", but only following a rebudgeting of the family by the county welfare board of the income and resources of the family as contrasted with the family's financial needs.

Again, they allege that they argued below that the welfare board's action was a violation of due process in that the stepfather petitioner "was now forced to support his stepchildren even though he was under no legal obligation to do so". This argument was dispatched by the State Court as follows:

> "Neither the board nor the Department purported to impose a legal obligation on the stepfather to support his stepchildren and, indeed, it was not within their power to do so."

In the *King* case, this Court held that there was "no question that States have considerable latitude in allocating their Aid For Dependent Children resoures, since each State is free to set its own standard of needs".

In fact, in that case this Court held that even contributions from "the kind of person Alabama calls a substitute father can be taken into account in determining whether the child is needy", and, "if by reason of such a man's contribution the child is not in financial need, the child would be ineligible for Aid For Dependent Children assistance without regard to the substitute father role".

III

There is no important question of federal law.

Petitioner's allege that the United States Supreme Court has never decided "whether the 'other income and re-

sources' referred to in both the Social Security Act and Title 44 of the New Jersey Statutes includes 'assumed' income or only actual contributions". This question is not involved in the present case because the facts, as found by the State Agency and the State Court, were that this stepfather was making actual contributions to the stepchildren. Accordingly, that issue was not involved in this case and the Court should not hear such a hypothetical issue.

Furthermore, even if such a hypothetical issue were involved in this case this Court's decision in the *King* case (*supra*) would be fully dispositive of same.

There is no question in this case concerning whether this stepfather, by administrative action, is being legally obligated to provide support to his stepchildren. It is the law of New Jersey that such a stepparent is not liable for his stepchildren. This was recognized by the State administrative agency and reiterated by the State Court below. Additionally, that is an entirely different question from the question whether actual and regular contributions from a stepfather in a situation like ours, even though voluntary, may be considered when determining whether children are eligible for Aid For Dependent Children under the State's assistance plan.

In their petition for certiorari, petitioners state that they "do not seek to ban the state from inquiring into the amount of money which the stepfather may make available to the children" nor "seek to prohibit the county welfare board from reducing their Aid For Dependent Children grant on the basis of contributions actually made". They allege "they seek only a declaration that the State agency may not arbitrarily assume that the stepfather's income is available regardless of facts to the contrary". In reply to this, respondents urge that such a declaration

by this Court is not necessary. This is already the law and the State is willing to stipulate same. The State of New Jersey in all cases, including this case, does not "arbitrarily assume that the stepfather's income is available regardless of facts to the contrary". Again, we come to the heart of the weakness of petitioners' position in this case, *i.e.*, they are attempting to submit this case to this Court on an entirely different statement of facts than existed in the case below as determined by the State administrative agency and the State Court.

Petitioners lay much stress on the fact that in August of 1968 the United States Department of Health, Education and Welfare promulgated Section 203.1 of Chap. 11, Title 45, which provides that State plans for aid to families with needy children must provide that in determining whether a child is needy only such net income as is actually available for current use on a regular basis for the child will be considered.

However, this requirement that only such net income as is actually available for current use on a regular basis should be considered in determining a child's needs, was in effect before this case was decided below. Even in 1967, prior to this Court's decision in the *King* case, the *Handbook of Public Assistance Administration,* section 3120, part 4, provided that in determining need, a state must take into account only available and regular contributions, and must not assume income. Moreover, this was expressly brought to the attention of the State Court.

It is a fair comment to say that the present petition seeks to convert a correct decision in a simple case into a Supreme Court case, which would merely reiterate the findings in the *King* case (*supra*) anyway.

Even if we assume *pro arguendo* that petitioners' financial circumstances have changed since the decision below,

they have only to go back to the welfare board and show same, and if they are eligible for assistance they will receive it. As the State Court observed of the State agency's opinion, it was indicated to petitioners from the onset that "it will be appropriate for her (petitioner) to make reapplication for assistance and have a rebudgeting of her case whenever any significant reductions in income or increases in requirements should occur in this family situation".

In view of this, and all of the above factors in this case, this Court should deny *Certiorari.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ARTHUR J. SILLS, ESQ.,
Attorney General of New Jersey,
Attorney for Respondent.
By: EUGENE T. URBANIAK,
Deputy Attorney General,
Of Counsel.

Date: April 15, 1969.

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1155

ANTHONY TARTAGLIO, CAROLYN TARTAGLIO, TERESA BASMAJIAN, JAMES BASMAJIAN, JR., STEVEN BASMAJIAN, CHERYL BASMAJIAN, RENEE BASMAJIAN (infants under the age of 14 years),

Petitioners,

vs.

DEPARTMENT OF INSTITUTIONS AND AGENCIES, DIVISION OF PUBLIC WELFARE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF FOR PETITIONERS

GEORGE F. BASON, JR.,
Attorney for Petitioners
Massachusetts and Nebraska
Avenues, N.W.
Washington, D.C. 20016

ROBERT P. SUBRANNI
Of Counsel
Cape-Atlantic Legal Services
1516 Atlantic Avenue
Atlantic City, New Jersey

Washington, D. C. · THIEL PRESS · 202 · 393-0825

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

I

RESPONDENT'S ARGUMENT THAT ONLY ACTUAL, VOLUNTARY CONTRIBUTIONS OF THE STEPFATHER WERE USED AS A BASIS FOR CUTTING OFF WELFARE AID HEREIN IS CONTRARY TO THE RECORD AND CONTRARY TO RESPONDENT'S OWN ARGUMENT THAT NEW JERSEY LAW REQUIRES *ALL* INCOME OF A STEPPARENT TO BE INCLUDED

Respondent correctly points out in Part I of its Opposition Brief that the applicable New Jersey Welfare Regulation[1]

[1] N.J. Categorical Assistance Budget Manual, § 706.2(c)(2)(a), quoted on page 4 of respondent's brief.

specifically requires that "the income of ALL members of the family," including "a stepparent," must be included in determining "need" for welfare aid. [Emphasis in original.] Yet respondent argues in Parts II and III of its brief that the Welfare Board in this case failed to do what that same New Jersey regulation required, that is, failed to *assume* the availability of ALL the stepfather's income. Instead (respondent argues), in apparently prescient compliance with an HEW regulation[2] which had not yet been promulgated at the time of the aid cut-off, the Welfare Board made a factual determination of "actual contributions" by the stepfather.

The record of the "fair hearing" itself demonstrates the lack of any factual support for this argument. The Welfare Board's own witness testified (Petition, p. 16) that the above-quoted State Welfare Regulation was "mandatory"; and the "fair hearing" Decision concludes (Petition, p. 17):

> "It is determined that the Atlantic County Welfare Board, in considering the net income of the husband and stepfather, after appropriate adjustment allowances [for job-related expenses], as available for the collective needs of the members of the family budget unit, did correctly apply the provisions of the Budget Manual as quoted above . . . [the same provision quoted herein]"

Respondent offers only two bases for its argument that the Welfare Board failed to follow its own mandatory regulation. First, respondent refers to the stepfather's claim for withholding tax exemptions. But, in accordance with federal tax law, this indicates only that he and his wife jointly claimed to be providing the five stepchildren with support, including food, shelter and clothing, of greater value than the $126 per month which the Welfare Board was providing them prior to its cut-off of funds—not that he was providing or was volunteering to provide ALL his income for their support. Second, respondent's main reliance is on a hearsay notation of a comment reportedly made by the stepfather

[2] 33 F.R. 11290, 45 C.F.R. § 203.1 (Aug. 8, 1968).

before his marriage and almost two years before the "fair hearing." Whatever may have been his intention at that earlier time, there is no showing that at the time of the "fair hearing" itself the stepfather was "willing to assume as much of the responsibility [for support of his stepchildren] as he could." Indeed, the fact that he joined in legally protesting the Welfare Board's cut-off of funds conclusively shows that he was not and is not willing to assume the entire burden of the stepchildren's support.

II

FEDERAL LAW NOW REQUIRES THAT A STATE PRESENT "PROOF OF ACTUAL CONTRIBUTIONS," RATHER THAN MERELY PROOF OF TOTAL NET INCOME OF A STEPFATHER, BEFORE CUTTING OFF WELFARE AID

Under New Jersey law this stepfather has no legal obligation to support his stepchildren. As respondent concedes on page 9 of its brief: "It is the law of New Jersey that such a stepparent is not liable [to provide support] for his stepchildren." Under federal law, therefore, the Welfare Board does have a legal obligation to provide aid for these children. HEW Regulation 203.1(b) (33 F.R. 11290, 45 C.F.R. § 203.1(b), Aug. 8, 1968) provides that "The inclusion in the family . . . of a 'substitute parent' [including a stepparent who is not "legally obligated to support the child under State law"– § 203.1(a)] is not an acceptable basis . . . for assuming the availability of income . . .". The same regulation further requires that "proof of actual contributions" by a "substitute parent" must be presented before welfare aid can be cut off. The record shows that the only proof presented at the "fair hearing" in this case was of the stepfather's *total* net income and that there was *no* proof of "actual contributions." (Petition, p. 15.) This case was *sub judice* at the time of adoption of this HEW regulation, and hence the regulation should be applied herein, to require the Welfare Board to meet its legal obligation to provide aid for these children. *Thorpe v. Housing Authority of the*

City of Durham, ___ U.S. ___, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition itself, the petition for a writ of certiorari herein should be granted.

Respectfully submitted,

GEORGE F. BASON, JR.,
Attorney for Petitioners,
Massachusetts and Nebraska
Avenues, N.W.
Washington, D.C. 20016

April 24, 1969

APPENDIX

Section 203.1, Regulations Relating to Public Welfare, Department of Health, Education and Welfare, 33 F.R. 11290, 45 C.F.R. § 203.1 (Aug. 8, 1968), provides:

(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act, to be approved under section 402 of such Act (42 U.S.C. 602), must provide that the determination whether a child had been deprived of parental support or care by reason of the death, continual absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. As provided in Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968), items 3.C.2 (i) and (iii), and 6(ii), in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.

(c) Any State whose past policies and procedures with respect to the determination referred to in paragraph (a) of this section have been inconsistent with the provisions in paragraph (a) or (b) of this section must provide effective methods for giving notice of its present policies and procedures to former and potential applicants for and recipients of AFDC and to other interested persons. The methods which the State agency proposes to meet this notice requirement must be submitted to and be approved by the Regional Commissioner, SRS, DHEW. In addition, where the records of the State agency permit identification of persons whose cases have been terminated or applications denied at any time within the past 2 years by reason of such inconsistent policies or procedures, the State agency must give prompt written notification to such persons concerning the change in such policies or procedures. Such notification must be given within 90 days of publication of the regulations in this part and must explain clearly the rights which such persons have under the regulations in this part.